LOUIS A. HIGHMAN, ESQ., State Bar No. 61703
LAWRENCE BALL, ESQ., State Bar No. 60496
HIGHMAN, HIGHMAN & BALL
A Professional Law Association
870 Market Street, Suite 467
San Francisco, CA 94102
Telephone: (415) 982-5563
Facsimile: (415) 982-5202

Attorneys for Plaintiff Fikret Ashkar

United States District Court

Northern District of California

San Francisco Division

FIKRET ASHKAR,

Plaintiff,

-v-

TGC 24 HOUR TRUCK REPAIR INC.; TGC TRUCK REPAIR, INC; DOES I-XX,

Defendants.

_____/

No. C 07-04236 JCS

PLAINTIFF FIKRET ASHKAR'S NOTICE OF MOTION AND MOTION TO REMAND CASE TO SUPERIOR COURT; AND PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO REMAND CASE TO SUPERIOR COURT

DATE OF HEARING: 10-19-2007
TIME: 9:30 A.M.
CTRM: Courtroom A, 15th Floor
JUDGE: HON. JOSEPH C. SPERO

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NOTICE OF MOTION TO REMAND

TO ALL PARTIES AND TO OTHEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Friday, October 19, 2007 in courtroom 12 on the 19th floor of the above-entitled Court, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, California, the Hon. Joseph C. Spero presiding, plaintiff will move the above-entitled Court for an order remanding the above-entitled case to the Superior Court of California, County of San Francisco. The motion will be made pursuant to 28 U.S.C. Section 1447 on grounds that the case should be remanded because the U.S. District Court has no subject matter jurisdiction over this case. The motion will be based on this notice of motion, the memorandum of points and authorities appearing below, the Declaration of Fikret Ashkar in Support of Motion to Remand Case to Superior Court, and all papers on file herein.

DATED: September 14, 2007.

LOUIS A. HIGHMAN
LAWRENCE BALL
HIGHMAN, HIGHMAN & BALL

By _____
Attorneys for Plaintiff
FIKRET ASHKAR

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES

The issues to be decided in this motion to remand are:

1. Whether this Court should order this case remanded to the Superior Court of California, County of San Francisco.

2. Whether this Court has subject matter jurisdiction of this case, based on defendants' claim, made in its Notice of Removal of Action Pursuant to 28 U.S.C. Section 1441(b), that plaintiff's claims allegedly raised a federal question subject to removal and that plaintiff's claims were completely preempted.

II. STATEMENT OF FACTS

Plaintiff filed a complaint in Superior Court of the State of California for the County of San Francisco on November 30, 2007 against defendants TGC 24 Hour Truck Repair, Inc., TGC Truck Repair, Inc., and Does I-XX, CGC-07-464703. The complaint alleged that the defendants were both California corporations with their principal place of business in San Francisco, California. Defendant TGC 24 Hour Truck Repair, thereafter filed a Notice of Removal of the action to U.S. District Court, alleging it was also counsel for TGC Truck Repair, Inc. and that it would be appearing on behalf of TGC Truck Repair, Inc. (after it was served), and indicating it had the consent in filing the Notice of Removal of TCG Truck Repair, Inc. (Plaintiff has actually served both named defendants--see Declaration of Louis A. Highman in Support of Motion to Remand--although only defendant TGC 24 Hour Truck Repair, Inc. has made a formal appearance as of this time.)

Defendants do not deny they are both California businesses, and do not claim any diversity jurisdiction.

Rather the grounds set forth by defendants in their notice of removal are that plaintiff's claims allegedly raise

a federal question subject to removal and that plaintiff's claims are completely preempted, allegedly because there was a collective bargaining agreement in effect, and plaintiff was a member of the union which entered into a collective bargaining agreement with defendants, and was subject to the collective bargaining agreement. Defendants argue that the fact that plaintiff was a member of the union which entered into a collective bargaining agreement with the employer somehow means there is a federal question involved in plaintiff's state law causes of action, and completely preempts plaintiff's state law claims. Defendants have not submitted a copy of the collective bargaining agreement to the Court (which it refers to in its notice of removal as the basis for removal, but does not attach). Plaintiff Fikret Ashkar is attaching a copy of the collective bargaining agreement referenced by defendants in his supporting declaration filed with this motion.

Plaintiff has brought two causes of action in his complaint on file herein.

The first claim is violation of the California Fair Employment and Housing Act, and specifically the provisions of California Government Code Section 12940(a), (m), (n), and (h)--disability discrimination, failure to grant reasonable accommodation for disability, failure to engage in interactive process re disability, and retaliation for opposing practices forbidden under the California Fair Employment and Housing Act, i.e., plaintiff was terminated because he had opposed

defendants' attempts to deny allowing him a reasonable accommodation for disability and had opposed defendants' discriminating against him related to his disability.

The second claim brought by plaintiff is for statutory penalties owing him under California Labor Code Section 203 for failure to pay wages owing him in a timely manner at the time of his termination. California Labor Code Section 201 required that all wages owing plaintiff be paid him immediately at the time of his termination (on or about August 15, 2006), but he did not receive all wages owing him until on or about September 6, 2006, and under California Labor Code Section 203 he is entitled to a statutory penalty for the late payment of these wages.

Neither of these two state law claims (violation of FEHA and claim for statutory penalties owing based on Cal. Labor Code Section 203--the only claims brought by plaintiff in this case--are subject to any federal question, or preempted in any way by any collective bargaining agreement or federal statute.

In the state court complaint (CGC-07-464703, now removed to this Court), plaintiff, a mechanic, alleged that after he was injured and became disabled, he could then only work, based on doctor's orders, with certain work restrictions in terms of type of work he could do and weight he could lift because of his disability. He further alleges that defendants ignored the doctor's orders to grant him a reasonable accommodation for his disability, and refused to grant him a reasonable accommodation for his disability. Plaintiff

further alleges that he protested defendants' refusal to grant him this reasonable accommodation for his disability, and defendants engaged in retaliatory conduct and terminated him. Plaintiff alleges he was terminated because of disability discrimination, and related to his having sought a reasonable accommodation for his disability, and in retaliation for his having opposed defendants' discrimination against him related to his disability and his attempt to continue to seek a reasonable accommodation for his disability and engage in an interactive process to determine a reasonable accommodation, all in violation of the California Fair Employment and Housing Act's prohibition of disability discrimination (including reasonable accommodation requirements) and the Act's prohibition of retaliation for opposing discriminatory practices.

Plaintiff is attaching to his declaration a copy of the collective bargaining agreement referred to in defendants' notice of removal, and upon which defendants are basing their removal. As can be seen, the collective bargaining agreement in question does not address disability discrimination, does not address in any way reasonable accommodation for a disability, and does not address retaliation against a person for opposing disability discrimination. No provision in the collective bargaining agreement has to be interpreted or applied in order to decide whether a reasonable accommodation for disability was granted, whether an employee was terminated because of a motivation of disability discrimination, what

procedure should be followed to determine a reasonable accommodation for disability, or whether an employee was terminated or otherwise treated adversely because of retaliation against him for opposing a practice of discrimination prohibited by the California Fair Employment and Housing Act (such as disability discrimination provisions of the Act).

III. ARGUMENT

A. LEGAL STANDARD REGARDING REMOVAL BASED ON ALLEGED FEDERAL QUESTION AND ALLEGED PREEMPTION BASED ON LMRA SECTION 301

A defendant is entitled to remove to federal court any civil action over which the federal court has original jurisdiction. However, the Ninth Circuit strictly construes the removal statute against removal jurisdiction. Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). "The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper." Id., quoting from St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-90 (1938).

"The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).

A defense of preemption does not create federal question jurisdiction. (See Caterpillar, Inc. v. Williams, 482 U.S.

386, 388-389 (1987); Ben. Nat'l. Bank v. Anderson, 539 U.S. 1 (2003) [federal defense raised by defendant in preemption case does not justify removal]. In the Ninth Circuit en banc decision of Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001 (en banc), the Court stated that, "[t]he plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on state law, Section 301 pre-emption is not mandated simply because the defendant refers to the CBA in mounting a defense."

Defendants in the case herein are apparently arguing that the Labor Management Relations Act (LMRA), Section 301, 29 U.S.C.A. Section 185 preempts (a) plaintiff's state law claim for violation of the California Fair Employment and housing Act; and (b) plaintiff's state law claim for penalties owed for defendants' failure to pay him his last paycheck at the time he was terminated (Cal. Labor Code Section 203).

Section 301 of the LMRA governs claims founded directly on rights created by collective bargaining agreements, and also claims substantially dependent on analysis of a collective bargaining agreement. Caterpillar, Inc. v. Williams, 482 U.S. 386. 394 (1987). The LMRA does not preempt an employee's independent freestanding state rights. Id., at 395. However, if the resolution of a state law claim substantially depends on an analysis of a collective bargaining agreement, the application of state law is preempted. Significantly, though, the "bare fact that a

collective-bargaining agreement will be consulted in the course of state law litigation plainly does not require the claim to be extinguished". Livadas v. Bradshaw, 512 U.S. 107, 124 (1994) [specifically holding that Cal. Labor Code Section 203, which is the same section of law at issue in our case in the second cause of action, is not preempted by the LMRA]. Moreover, a court may also look to the CBA for numerous other purposes (including, without limitation, to determine whether it contains a clear and unmistakable waiver of state law rights) without triggering Section 301 preemption. See Cramer v. Consolidated Freightways, Inc., 25F.3d 683, 692 (9th Cir. 2001).

Essentially, state law claims are preempted by the LMRA only if a court must interpret, rather than merely refer to or examine, a collective bargaining agreement, such that the state law claim is substantially dependent on analysis of a collective bargaining agreement. Courts have also held that state law claims based on non-negotiable rights based on public policy are not preempted.

Significantly, in this regard, courts have consistently held that claims for violation of the California Fair Employment and Housing Act such as the one plaintiff has brought, and claims for wage and hour violations under the California Labor Code (including Cal. Labor Code Section 203, which is the exact California Labor Code claim brought in our case) are not preempted by the LMRA, and do not invoke a federal question, and that motions to remand pertaining

thereto should be granted.

B. PLAINTIFF'S CLAIM THAT DEFENDANTS VIOLATED THE CALIFORNIA FAIR EMLOYMENT AND HOUSING ACT DOES NOT RAISE A FEDERAL QUESTION SUBJECT TO REMOVAL, AND IS NOT PREEMPTED BY THE COLLECTIVE BARGAINING AGREEMENT OR THE LABOR MANAGEMENT RELATIONS ACT (LMRA) OR ANY OTHER FEDERAL STATUTE

In Jimeno v. Mobil Oil Corporation, 66 F.3d 1514 (1995), the Ninth Circuit held that the federal Labor Management Relations Act did not preempt a claim under the California Fair Employment and Housing Act for physical disability discrimination in employment, since such a claim for violation of the Fair Employment and Housing Act was not substantially dependent on analysis of the collective bargaining agreement.

Moreover, independently, the Court in Jimeno, id., held that the State of California did not show any intent to allow its prohibition on disability discrimination under the California Fair Employment and Housing Act to be altered or removed by private contract (such as a CBA), which was a prerequisite for a discrimination claim to be preempted under the federal Labor Management Relations Act, since the Fair Employment and Housing Act explicitly established the right to employment without discrimination based on disability as being the public policy of the state. (See, e.g., Cal. Gov't. Code Sections 12920, 12920.5, and 12921.)

The Court in Jimeno, id., indicated it was significant that the collective bargaining agreement in the case, though establishing physical fitness examinations as a condition of employment, was silent regarding possible management responses when an employee was determined to be unfit to continue in a

position without work restrictions.

The Court in Jimeno, id., also pointed out that significantly no requirement was set forth in the collective bargaining agreement therein regarding determination of reasonableness of any adjustments to employee work load or work environment to accommodate those with work restrictions, and also pointed out that the collective bargaining agreement in the case was silent regarding ways that management might restructure positions to modify workload or design specific arrangements to accommodate employees who were capable of working with certain restrictions.

The Court in Jimeno, id., also noted that the CBA referred to in the case did not require resolution of physical fitness questions through an exclusive grievance procedure.

It also noted that the employee's prima facie case under the California Fair Employment and Housing Act in the case could be evaluated without reference to the collective bargaining agreement in the case (which collective bargaining agreement did not refer to reasonable accommodation), and that statutory and regulatory standards of FEHA provided means to determine reasonable accommodation, without reference to the collective bargaining agreement. The Court in Jimeno, id., pointed out that the employer had terminated the employee therein without exploring other options to accommodate the employee, and that the collective bargaining agreement was only peripherally relevant to evaluation of hardship to the employer.

Additionally, the Court in Jimeno stated that the State of California did not show any intent to allow its prohibition on disability discrimination under the California Fair Employment and Housing Act to be altered or removed by private contract, which would be a prerequisite for a discrimination claim to be preempted under the federal Labor Management Relations Act, since the Fair Employment and Housing Act explicitly established right to employment without discrimination based on disability as being the public policy of the state. (See, e.g., Cal. Gov't. Code Sections 12920, 12920.5, and 12921.)

Similarly, in Humble v. Boeing Company, 305 F.3d 1004 (9th Cir. 2002), the plaintiff brought a motion to remand a state law discrimination claim brought under the State of Washington's anti-discrimination law, including a claim for failure to provide reasonable accommodation for disability and a claim for retaliation related to her requesting reasonable accommodation for disability. The Court in Humble, id., held that the state discrimination/retaliation law claim made therein was not preempted by the Labor Management Relations Act for a variety of reasons. Among other things, the Court stated that reliance on CBA provisions to defend against an independent state law claim, such as the Washington state anti-discrimination law, did not trigger Section 301 preemption. The Court also stated that the state law claim was based on non-negotiable duties under Washington law (not to discriminate or retaliate), and so did not "substantially

depend" upon application and interpretation of any CBA terms.

The Court in Humble, id., also noted that there was a range of accommodation for a disability the employer might have provided which would not have required interpreting the terms of the CBA. The CBA referred to in the Humble case did have a transfer provision, but the Court noted that a transfer governed by the CBA's bidding process was only one of the available options for reasonable accommodation for disability, and did not preclude other reasonable accommodations not covered by the CBA. (In our case, a transfer provision is not even addressed in the CBA, let alone numerous other reasonable accommodations that could have been made by defendants. Nor did plaintiff in our case seek a transfer; rather he sought a reasonable accommodation as to lifting, motion, and weight issues which would have involved some modification, for a while, in his assignments, which could have been accommodated, and which type of accommodation was not addressed in the collective bargaining agreement in our case at all. In fact, no reasonable accommodations were addressed in the collective bargaining agreement at all in our case.)

The Court in Humble, id., made clear that, "There is no dispute that the duty to reasonably accommodate workers is non-negotiable under Washington law", and accordingly was not preempted by any provisions of the collective bargaining agreement or the LMRA.

The collective bargaining agreement in our case does not address at all the issue of reasonable accommodation, nor the

type of reasonable accommodation for disability plaintiff was seeking, nor does it contain any bargained for disability discrimination provisions. Nor does it address retaliation. The state law claims simply do not depend at all in any respect on interpretation and application of the collective bargaining agreement, let alone substantially depend thereon.

In fact, very significantly, the collective bargaining agreement in our case specifically defers to the California state law on disability discrimination as being controlling, stating, that "The Company will abide by all State and federal laws regarding handicapped and disabled persons." (See page 14, Section 29.1, CBA, Ex. 1 to Ashkar declaration.)

Thus, the independent statutory duty under the California Fair Employment and Housing Act to reasonably accommodate and not discriminate against an employee because of discrimination, and not to retaliate against him for opposing such discriminatory practices, governs, and the legal requirement thereof can be determined without dependence on the collective bargaining agreement; and the CBA in our case in fact specifically defers to the state anti-discrimination law as being controlling in this regard and not modified by, or dependent on, any provisions of the collective bargaining agreement. (See e.g., Burnside v. Kiewit Pacific Corp., 491 F.3d 1053 (9th Cir. 2007) ["Agreements 1, 4, and 5, at best, merely confirm that they confer upon employees the same right already conferred upon them by state law. As the Court explained in Lingle, "[T]he mere fact that a broad contractual

protection. . . may provide a remedy for conduct that coincidentally violates state-law does not make the existence of the contours of the state law violation dependent upon the terms of the private contract." See 486 U.S. at 412-13, 108 S.Ct. 1877."]

Moreover, as the Ninth Circuit held in Jimeno, supra, the State of California has not shown any intent to allow its prohibition on disability discrimination under the California Fair Employment and Housing Act to be altered or removed by private contract (such as a CBA). Rather, the California Fair Employment and Housing Act explicitly established the right to employment without discrimination based on disability (as well as other bases) as being the public policy of the state, and accordingly, a discrimination claim brought under FEHA cannot be preempted under the federal Labor Management Relations Act, or governed by a collective bargaining agreement's provisions instead of by independent state legal standards.

Courts in the Ninth Circuit have consistently held that state law discrimination claims under the California Fair Employment and Housing Act do not require courts to interpret the terms of a collective bargaining agreement and are therefore not preempted by the LMRA. (See, e.g., Detabali v. St. Luke's Hospital, 482 F.3d 1199 (9th Cir. 2007) [claims for racial and national origin discrimination, and for retaliation, brought under FEHA were not preempted by LMRA, even though the claims depended on whether employee was terminated for refusing to work outside of her assigned

duties, and the court was required to refer to CBA to make such determination, since there was no dispute over the meaning of the terms in the CBA, and resolution of the central issues did not depend on interpretation of the CBA]; Ackerman v. W. Elec. Co., 860 F.2d 1514, 1517 (9th Cir. 1988) [finding of no Section 301 preemption of FEHA disability discrimination claim because the right not to be discriminated against because of physical handicap is "defined and enforced under state law without reference to the terms of any collective bargaining agreement"); Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283, 1286-87 (9th Cir. 1989) [finding no Section 301 preemption of FEHA age discrimination claim because the statute creates a "mandatory and independent state right"]; Cook v. Lindsay Olive Growers, 911 F.2d 233, 240 (9th Cir. 1990) [finding no Section 301 preemption of FEHA religious discrimination claim because "the right not to be discriminated against on the basis of religion cannot be removed by private contract"]; Ramirez v. Fox Television Station, 998 F.2d 743, 749 (9th Cir. 1993) [finding no Section 301 preemption of FEHA national origin discrimination claim where plaintiff alleged that the defendant discriminated against her by failing to promote her and denying her preferred assignments, even though promotion and job assignment were explicitly governed by the CBA]; Schrader v. Noll Manufacturing Company, 91 Fed.Appx. 553 (9th Cir. 2004) [age and disability claims brought under FEHA not preempted by LMRA]; Jackson v. Southern California Gas Company, 881 F.2d

638 (9th Cir. 1988) [race discrimination claim under FEHA not preempted by LMRA].) See also, Lumper v. Boeing Corporation, 77 Fed. Appx. 946 (9th Cir. 2003) [state anti-discrimination law provisions do not necessarily require CBA interpretation, and these state law rights are not negotiable, and so are not subject to LMRA preemption]; See also Miller v. AT&T Network Systems, 850 F.2d 543 (9th Cir. 1988) [claim under Oregon anti-discrimination state law not preempted by LMRA].

C. CLAIMS FOR WAGES BROUGHT UNDER THE CALIFORNIA LABOR CODE, INCLUDING CLAIMS BROUGHT UNDER CALIFORNIA LABOR CODE SECTION 203, ARE NOT PREEMPTED BY PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT OR THE LMRA OR OTHERWISE, AND DO NOT RAISE A FEDERAL QUESTION SUBJECT TO REMOVAL

The other claim plaintiff has brought is for violation of Cal. Labor Code Section 203, which provides for up to a 30-day continuation of wages penalty against an employer which does not pay its employee his/her final paycheck immediately at the time of termination. (Cal. Labor Code Section 201 establishes the requirement that an employee receive payment of all wages owed to him immediately upon termination; Cal. Labor Code Section 203 prescribes the penalty for failing to comply with Cal. Labor Code Section 201; and Cal. Labor Code Section 218, permits an employee to file a civil action to seek wages and penalties owing under the California Labor Code--in this case a penalty authorized under California Labor Code Section 203).

Courts have consistently held that wage and hour claims brought under the California Labor Code, and including specifically claims brought pursuant to California Labor Code

Section 203, are not preempted by the LMRA, and do not raise a federal question subject to removal, and that such a claim is not removable to federal court. (See Livadas v. Bradshaw, 512 U.S. 107 (1994); Bonilla v. Starwood Hotels & Resorts Worldwide, Inc., 407 F.Supp.2d 1107 (C.D. California 2005); Balcorta v. 20th Century Fox Film Corp., 69 F.Supp.2d 1195 (C.D. California 1998); Gregory v. SCIE, LLC, 317 F.3d 1050 (9th Cir. 2003); Burnside v. Kiewit Pacific Corporation, 491 F.3d 1053 (9th Cir. 2007). In fact, state wages and hours laws in the California Labor Code override any provisions to the contrary in a collective bargaining agreement (assuming arguendo there was any overriding of such state law California Labor Code provisions in this case in the CBA, which there are not). (See, e.g., Industrial Welfare Commission v. Superior Court, 27 Cal.3d 690, 725-729 (1980); Terminal Ass'n v. Trainmen, 318 U.S. 1, 6-7 (1943).

IV. CONCLUSION

For all the aforesaid reasons, this Court should grant the motion to remand, and order this case remanded to the Superior Court of California, County of San Francisco.

This Court does not have subject matter jurisdiction of this case, or any other type of jurisdiction. Plaintiff's claims do not raise a federal question subject to removal, and there is no preemption of this case by the LMRA, or in any other respect.

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DATED: September 14, 2007.

LOUIS A. HIGHMAN, ESQ.
LAWRENCE BALL, ESQ.
HIGHMAN, HIGHMAN & BALL

By _____
Attorneys for Plaintiff
Fikret Ashkar